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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

REGINA L. BLACKHURST et al., Plaintiffs and Appellants, v. MARK A. PRUNER, Defendant and Respondent.	C043052 (Super. Ct. No. 02AS05586)

Plaintiffs Regina and David Blackhurst appeal from a trial court judgment dismissing defendant Mark Pruner from the Blackhursts' lawsuit against Trinity Life Center (Trinity), certain officers and employees of Trinity, and Pruner, Trinity's attorney, following Pruner's successful demurrer to the complaint.

The Blackhursts, who appear in propria persona, claim the trial court erred in determining the litigation privilege set forth in Civil Code section 47, subdivision (b)(2) was

applicable, and in determining Pruner's conduct was not outrageous. We disagree and shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On an appeal from a judgment of dismissal after a demurrer has been sustained, we accept the material allegations of the complaint as true, as well as facts that may be properly judicially noticed. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 672.) The Blackhursts allege the following facts in their complaint.

Plaintiff Regina Blackhurst was fired from her job as a teacher at Trinity Tots Preschool shortly after the director of the preschool, Donna Harrell, became aware Mrs. Blackhurst was pregnant. Trinity Tots Preschool is a division of defendant Trinity.

Mr. Blackhurst phoned one of Trinity's pastors and informed him the school had just fired a pregnant woman. Mr. Blackhurst suggested they meet to resolve the situation. The Blackhursts met with Pastor Mauch and Pruner, Trinity's attorney. At the meeting Pruner stated Mrs. Blackhurst had been terminated for cause because she had used corporal punishment. The Blackhursts denied this allegation and demanded an investigation. Pruner stated there would be a thorough investigation, and that he would contact the Blackhursts. He also stated he would inform Trinity's board of directors of the situation and the outcome of the investigation.

The Blackhursts alleged the investigation was superficial and was a pretext to divert plaintiffs from their claims while the defendants created or conspired to manufacture evidence supporting a termination for cause and to tamper with material witnesses.

Based upon these allegations, the Blackhursts asserted the following causes of action: (1) Wrongful termination; (2) Breach of the Covenant of Good Faith and Fair Dealing; (3) Defamation; (4) Fraud; (5) Intentional Infliction of Emotional Distress; and (6) Violation of the Equal Pay Act.

Pruner demurred to the complaint. The trial court sustained the demurrer to the first, second, and sixth causes of action on the ground Pruner was not alleged to have been Mrs. Blackhurst's employer. The trial court sustained the demurrer to the third cause of action (defamation) on the ground of privilege pursuant to Civil Code section 47, subdivision (b)(2). The trial court sustained the demurrer to the fourth cause of action (fraud) on the ground Pruner had no duty to plaintiffs to investigate the allegations against Mrs. Blackhurst, and on the grounds no reliance or damages were sufficiently alleged. The trial court sustained the demurrer to the fifth cause of action (intentional infliction of emotional distress) on the ground Pruner's action in stating Mrs. Blackhurst had been terminated for corporal punishment and that he would investigate the matter was not outrageous conduct.

DISCUSSION

The Blackhursts concede on appeal that Pruner is a defendant only with respect to the Fraud, Defamation, and Intentional Infliction of Emotional Distress causes of action. Accordingly, we review on appeal those causes of action.

Alluding, apparently, to Code of Civil Procedure section 452, the Blackhursts claim Pruner should be included in their pleading to achieve substantial justice.[1] However, no amount of liberal construction can save a defective complaint. Where a demurrer has been sustained without leave to amend, plaintiffs have the burden of proving there is a reasonable probability the defects can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Plaintiffs have not met this burden.

I
Litigation Privilege

Pruner is alleged to have stated at the meeting with the Blackhursts and Pastor Mauch that Mrs. Blackhurst had been terminated for using corporal punishment and that he would investigate and follow up on the allegations.

Under the litigation privilege asserted in Civil Code section 47, subdivision (b), "A privileged publication or broadcast is one made: [¶] . . . [¶] (b) In any . . . judicial proceeding, ..." Although this language applies only to

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[1] Code of Civil Procedure section 452 provides: "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties."

judicial proceedings, courts have applied it to communications made in a prelitigation context. (*Edwards v. Centex Real Estate Corp.* (*Edwards*) (1997) 53 Cal.App.4th 15, 30.)

Edwards, supra, criticized the extension of the privilege in cases where litigation has not, "actually been threatened, proposed, or seriously contemplated, as long as there is a possibility a lawsuit may be filed in the future." (*Edwards, supra*, 53 Cal.App.4th at p. 32.) *Edwards* set forth the following four "considerations for distinguishing the point at which the litigation privilege may attach to statements in advance of litigation." (*Id.* at p. 34.) First, "a lawsuit or some other form of proceeding must actually be suggested or proposed, orally or in writing . . . ." (*Ibid.*) "Second, the verbal proposal of litigation must be made *in good faith*." (*Id.* at p. 35, orig. italics.) "Third, the contemplated litigation must be *imminent*." (*Ibid.*, orig. italics.) This means the parties must be "negotiating under the actual threat of impending litigation[.]" (*Ibid.*) "Finally, the litigation must be proposed in order to obtain access to the courts *for the purpose of resolving the dispute*." (*Ibid.*, orig. italics.)

The Blackhursts quote liberally from *Edwards, supra*, and argue that the litigation privilege does not apply because there was as yet no litigation when the statement was made.

However, as noted in *Aronson v. Kinsella* (1997) 58 Cal.App.4th 254, 267-268, "[t]he language in *Edwards* must be viewed in the context of the case. *Edwards* involved an attempt

to apply the litigation privilege to statements made by a developer and insurance company many years before the litigation was commenced. . . . Thus, in *Edwards,* the court was faced with an extreme situation, where the statements were very remote in time from the actual litigation. The 'imminent' language was in response to this remoteness; to emphasize that litigation must be contemplated at the time the statements are made. The court held the litigation privilege did not apply because the statements were simply too remote from the litigation."

Applying the factors set forth in *Edwards* to the facts alleged here, we conclude the litigation privilege applies. First, the statement was made preliminary to a proposed judicial proceeding. There was an actual verbalization of the danger that the controversy would turn into a lawsuit. Mr. Blackhurst "confronted" Pastor Mauch with his wife's termination in light of the fact that she was pregnant and suggested they meet to resolve the situation. The Blackhursts were alleging "wrongful termination and discrimination."

Second, Pruner had a good faith belief that litigation was being proposed. The speaker's good faith contemplation of litigation is required to establish the privilege. (*Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, 777; *Edwards, supra*, 53 Cal.App.4th at p. 39.) The complaint, which we must accept as true, states that Pruner made the false accusation because he knew the Blackhursts intended to pursue an

action against the defendants. This also proves the third factor, that litigation was more than just a mere possibility.

Finally, the purpose of the threatened litigation was to resolve a dispute that was the subject of ensuing litigation and about which the statements were made. Accordingly, the statements were privileged, and the trial court did not err in sustaining the demurrer.

Since in this case the liability for intentional infliction of emotional distress is based upon the publication of an injurious falsehood, the privilege applies to that cause of action as well. (*Block v. Sacramento Clinical Labs, Inc.* (1982) 131 Cal.App.3d 386, 391; *Begier v. Strom* (1996) 46 Cal.App.4th 877, 882.) For this reason we need not reach the Blackhursts' argument that the trial court erred in finding Pruner's conduct was not outrageous for purposes of this tort.[2]

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[2] Under the heading, "Civil Code § 1714.10 [see section III, *post*] Describes a Specific Circumstance Under Which an Attorney May Be Sued, The Facts of Which Are Applicable to This Case" the opening brief contains the statement, "the court erred in the determination that respondent 'had no duty under these circumstances to plaintiffs.'" This is apparently in reference to the trial court's order sustaining the demurrer on the fraud cause of action. The text prior to this statement relates to the issue of duty. If the plaintiffs are intending to argue the fraud cause of action should have been allowed to stand because Pruner owed them a legal duty, this argument fails because even if the trial court erred in finding no duty, such error is not prejudicial. The trial court cited two other reasons for sustaining the demurrer to the fraud cause of action, specifically, plaintiffs did not sufficiently allege reliance or damages. Plaintiffs have raised no argument on appeal that the trial court erred in finding the complaint deficient in these

II
Malicious Prosecution

The opening brief argues we should address the issue of malicious prosecution as it applies to this case. The short answer is that it is inapplicable. No cause of malicious prosecution was alleged in the complaint, nor could it properly have been alleged. An action for malicious prosecution requires the plaintiff to plead and prove a prior action was commenced by or at the direction of defendant and pursued to a legal termination in plaintiff's favor. (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50.) These are facts the Blackhursts are unable to allege because there was no prior action commenced by the defendants.

III
Civil Code Section 1714.10

The Blackhursts argue Civil Code section 1714.10 is applicable to this case. It is not.

Section 1714.10 provides that a cause of action for civil conspiracy may not be brought against an attorney based upon the attorney's representation of a client unless a court enters an order allowing such pleading upon a determination that there is a reasonable probability the party seeking to establish the conspiracy will prevail in the action. Failure to obtain such

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respects. Any such argument is therefore waived. (*Tisher v. California Horse Racing Board* (1991) 231 Cal.App.3d 349, 361.)

an order is a defense to the action, but the defense is waived if not raised in a timely manner.[3]

The Blackhursts' complaint contained no cause of action for civil conspiracy. They obtained no court order allowing a complaint for civil conspiracy. Pruner asserted no defense based on section 1714.10.

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[3] The pertinent portions of section 1714.10 are as follows:

"(a) No cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes the claim for civil conspiracy to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action. The court may allow the filing of a pleading claiming liability based upon such a civil conspiracy following the filing of a verified petition therefor accompanied by the proposed pleading and supporting affidavits stating the facts upon which the liability is based. The court shall order service of the petition upon the party against whom the action is proposed to be filed and permit that party to submit opposing affidavits prior to making its determination. The filing of the petition, proposed pleading, and accompanying affidavits shall toll the running of any applicable statute of limitations until the final determination of the matter, which ruling, if favorable to the petitioning party, shall permit the proposed pleading to be filed.

(b) Failure to obtain a court order where required by subdivision (a) shall be a defense to any action for civil conspiracy filed in violation thereof. The defense shall be raised by the attorney charged with civil conspiracy upon that attorney's first appearance by demurrer, motion to strike, or such other motion or application as may be appropriate. Failure to timely raise the defense shall constitute a waiver thereof."

Although section 1714.10 has been held to apply where the plaintiffs alleged the attorneys "aided and abetted" their clients (*Howard v. Superior Court* (1992) 2 Cal.App.4th 745, 747, 749), it does not apply where the complaint alleges, as does the instant complaint, wholly independent causes of action against the attorney. (*Westamco Investment Co. v. Lee* (1999) 69 Cal.App.4th 481, 487.)

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

MORRISON, J.

ROBIE, J.